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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO JAVIER VELEZ, Defendant and Appellant.	E048360 (Super.Ct.No. SWF022996) **OPINION**

APPEAL from the Superior Court of Riverside County. Sharon J. Waters, Judge. Affirmed with directions.

Sylvia Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Gil Gonzalez and Garrett Beaumont, Deputy Attorneys General, for Plaintiff and Respondent.

On September 16, 2007, defendant Francisco Javier Velez was seen emerging from a broken plate glass window at a video store in Hemet carrying bags in his hand. Inside the bags, officers found video games valued at $13,137.81.

Defendant was convicted by a Riverside County jury of commercial burglary (Penal Code, § 459),[1] grand theft (§ 487, subd. (a)), and misdemeanor resisting arrest (§ 148, subd. (a)(1)). In a bifurcated proceeding, the trial court found that defendant had suffered two prior serious or violent felony offenses (§§ 667, subds. (c) and (e)(2)(A), 1170.12, subd. (c)(2)(A)) and that he had served four prior prison terms (§667.5, subd. (b)).

The trial court sentenced defendant to the three-strikes sentence of 25 years to life on the burglary, plus two years for two of the prior prison term enhancements, for a total of 27 years to life in state prison. Sentence on the grand theft was stayed pursuant to section 654, the misdemeanor resisting arrest sentence of 180 days was to be served concurrently, and the trial court struck the remaining prior prison term enhancements.[2]

Defendant now contends,

1. The trial court abused its discretion under Evidence Code section 352 when it excluded testimony regarding his mental state.

2. He was denied his due process right to a fair trial when the jury was inadvertently shown a "priors packet" during deliberations on the charged offenses despite a bifurcated trial.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Although not raised by defendant, we note that the minute order from sentencing on May 8, 2009, and the abstract of judgment stated that the trial court stayed two of the prior prison term enhancements despite the trial court striking the enhancements. We will order the clerk of the Riverside County Superior Court to correct the minute order and abstract of judgment to conform with the trial court's oral sentence. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

3. The trial court did not exercise its discretion appropriately when it denied his *Romero*[3] motion to strike the prior convictions.

4. His sentence is cruel and/or unusual punishment under the federal and state Constitutions.

We conclude there were no prejudicial trial errors, his three-strikes sentence was appropriately imposed, and his sentence does not constitute cruel and/or unusual punishment. We affirm the judgment.

I

FACTUAL BACKGROUND

A. *People's Case*

About 7:30 a.m. on September 16, 2007, Riverside County Sheriff's Sergeant Michael Maddux responded to an alarm at a Blockbuster Video Store in Hemet. As Sergeant Maddux arrived at the store, he saw defendant exiting the store through the front plate glass window, which had been broken. Defendant had bags in his hand. When he saw Sergeant Maddux, he ran away. Sergeant Maddux and other officers were able to apprehend defendant after a foot pursuit.

While Riverside County Sheriff's Deputy Jesse Newby was transporting defendant to jail, defendant told Deputy Newby that his friend "Shane" broke the store window. Defendant admitted that he entered the store and took the video games. He told Deputy Newby he planned to sell them in order to buy methamphetamine.

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[3] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*).

Laura Lopez was the assistant manager at the video store. When she arrived at work, she saw Sergeant Maddux and Officer Newby standing in front of the store. She observed the broken front window. She went inside the store and found that all of the video games and movies in the store had been taken out of the drawers. The video games missing (and found in defendant's possession) were valued at $13,137.81. Surveillance video showed defendant entering the store alone and taking the video games.

B. *Defense*

Defendant testified on his own behalf, stating that he had been addicted to methamphetamines for years. He only stopped taking drugs when he was "incarcerated." He lost his job in July 2007 because he was using methamphetamine and not going to work. He was taking so many drugs around the time of the burglary that he was starting to hallucinate.

During the four or five days before the burglary at the Blockbuster, he had been consistently taking methamphetamine. He had not slept in four days. He eventually ended up walking on the street in Hemet. He did not recall being at the Blockbuster video store but did not deny he was "probably" there. The next thing defendant remembered was being driven to jail by Deputy Newby. He did not recall talking to Deputy Newby. Defendant admitted that he had been convicted of prior felonies of burglary, petty theft, assault, and attempted arson. He had pled guilty in each case.

C. *Rebuttal*

Deputy Newby did not observe any objective symptoms that would indicate defendant was under the influence of methamphetamine (such as rapid speech, constant

movement, teeth grinding, and eye "flutter[ing]"). He determined before transporting defendant that defendant was not under the influence. Defendant never told Deputy Newby that he was high on drugs.

II

EXCLUSION OF EVIDENCE

Defendant contends the trial court abused its discretion by excluding testimony proffered by him to support his defense of voluntary intoxication.

A. *Additional Factual Background*

During direct examination of defendant, his counsel asked him, "[I]f you hadn't been under the influence of methamphetamine, would you have broken into the Blockbuster?" The People's relevance objection was sustained by the trial court.

B. *Analysis*

Although defendant cites to Evidence Code section 352,[4] the trial court was never called upon to make such a determination. Rather, the objection sustained by the trial court was that the evidence was not relevant. The trial court found the evidence irrelevant, thereby making it unnecessary to determine whether it was more probative than prejudicial.

"No evidence is admissible except relevant evidence." (Evid. Code, § 350.) """Relevant evidence is defined in Evidence Code section 210 as evidence 'having any

[4] Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' The test of relevance is whether the evidence tends '"logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive. [Citations.]' [Citation.] The trial court has broad discretion in determining the relevance of evidence [citations] but lacks discretion to admit irrelevant evidence. [Citations.]" [Citation.]' [Citation.]" (*People v. Carter* (2005) 36 Cal.4th 1114, 1166-1167.)

Here, the trial court correctly found that defendant's testimony that he would not have committed the burglary if he had been sober was not relevant to defendant's intoxication defense. The only relevant evidence to the intoxication defense was defendant's testimony as to the level of his intoxication at the time of the crime so the jury could determine whether he possessed the specific intent for burglary and grand theft. Whether or not defendant would have committed the burglary sober was irrelevant to his defense.

Further, we reject that the exclusion of the evidence deprived defendant of his due process right to present a defense. "Although completely excluding evidence of an accused's defense theoretically could rise to [the] level [of a federal constitutional violation], excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense." (*People v. Fudge* (1994) 7 Cal.4th 1075, 1103.) Defendant was afforded an opportunity to present evidence of his intoxication through his own testimony that he did not recall being at the Blockbuster video store and that it was due to his drug use over the prior four to five days that he did

not remember. The jury was instructed that defendant's intoxication could be considered in determining whether he possessed the requisite intent to commit the crimes.[5] Defendant's counsel argued in closing that defendant did not have the specific intent to commit the crimes because he was too intoxicated, which, he argued, was supported by the fact defendant committed the crime in broad daylight, had no tools, and made no attempt to conceal his identity. Prohibiting defendant from presenting irrelevant evidence on whether he would have committed the crime had he been sober did not impair his defense. The jury was clearly presented with the defendant's intoxication defense.

Even if we assume that the trial court erred in excluding defendant's testimony, it is not reasonably probable that the jury would have reached a more favorable verdict even had the evidence been presented (*People v. Watson* (1956) 46 Cal.2d 818, 836-837), and, even assuming a due process violation, any error was harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]).

Here, defendant was caught red handed leaving the Blockbuster video store through a broken plate glass window. He was carrying over $13,000 in video games he

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[5] The jury was instructed with Judicial Council of California Jury Instruction (CALCRIM) No. 3426 as follows: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether defendant acted or failed to act with a specific intent as charged in Counts 1 [burglary] and 2 [grand theft]. [¶] A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink or other substance knowing that it can produce an intoxicating effect or willingly assuming the risk of that effect. [¶] In connection with Counts 1 and 2, the People have the burden of proving beyond a reasonable doubt that the defendant acted or failed to act with the requisite specific intent. If the People have not met this burden, you must find the defendant not guilty. You may not consider evidence of voluntary intoxication for any other purpose."

had stolen from the store. He immediately ran when he saw police officers, showing his consciousness of guilt. When defendant was apprehended, Deputy Newby testified, he exhibited no signs of being under the influence of methamphetamine. Defendant's own testimony that he recalled all of the events leading up to the burglary and after the burglary but did not recall being in the Blockbuster store was not credible. Based on the foregoing, any error occasioned by the trial court's exclusion of his testimony was harmless beyond a reasonable doubt.

III

IMPROPER VERDICT FORMS

Defendant contends the jury was improperly given the "priors packet" during their deliberations despite the fact the priors had been bifurcated from the substantive charges.

A. *Additional Factual Background*

During deliberations, the jury foreman sent out a note that provided as follows: "NEED MORE INFORMATION ON THE MEANING OF THE (FINDINGS). We have 3 forms regarding "FINDINGS" that require signature[.] These form[s] discuss prior convictions. Why do we need to sign these[?]" The trial court believed that the jury had inadvertently been given finding forms on the prior convictions despite the fact that there was a court trial on the prior convictions. The trial court recommended calling in the jurors and advising them that those findings forms were inadvertently given to them and that they should not consider them in their deliberations. The trial court would also refer them back to the jury instructions that informed them that defendant's prior convictions were only to be used in evaluating defendant's credibility and his intent. The trial court

rejected that any questioning of the jurors was necessary. If guilty verdicts were returned, defendant would have an opportunity to question the jurors and possibly bring a motion for a new trial.

Defendant's counsel clarified that six findings forms were given by the jury to the bailiff. They were all true finding forms on the prior convictions. Defendant brought a motion for mistrial. The forms informed the jurors that defendant had been in prison four times and had not remained free from custody for a period of five years. Although defendant had admitted the prior convictions, it was not before the jury that he spent time in prison. Also, two of the forms stated that two of the prior felonies were serious or violent. Attempted arson was only serious, not violent.

At that moment, the jury reached a verdict. A note was sent to the trial court: "WE HAVE A VERDICT. WE NEED A[N] EXPLANATION OF THE FINDING FORM."

The People argued the motion for mistrial should be denied because defendant admitted all of his prior convictions on the stand and admitted his incarceration. Further, the jury did not sign the forms, showing they followed the court's instructions that they were not to use the priors for anything but his credibility and intent.

The bailiff returned all of the signed verdict forms to the trial court, and more forms regarding the prior convictions (the not-true forms) were included. None of the forms (either true or not true) regarding the prior convictions were signed by the jury foreperson. All of the forms were admitted as Court's Exhibit 3. The trial court denied the motion for mistrial, finding that since the jury had reached a verdict, there was no

need to admonish them. Further, defendant could bring a motion for new trial as to whether the findings influenced the verdict.

After the verdicts were rendered, the trial court indicated that it would allow defense counsel (upon proper motion) access to the jurors' names and telephone numbers in order to investigate the motion for new trial. After the verdict, defendant filed a motion for the release of juror personal information. The trial court granted the request to the extent that defendant's counsel could contact the jurors by telephone. Defendant did not file a motion for new trial.

B. *Analysis*

Initially, we take issue with defendant's description of the information that went to the jury as a "priors packet." We have examined Court's Exhibit 3 (despite the parties' failure to have the exhibit transferred to this court), and it only includes the verdict forms for the prior convictions. Calling the forms a "priors packet" gives the false impression that the entire section 969b packet was inadvertently given to the jury. In reality, the jurors received blank verdict forms that had findings for the two strike prior convictions and the prior prison term enhancements under section 667.5, subdivision (b).

"A trial court should grant a motion for mistrial 'only when "'a party's chances of receiving a fair trial have been irreparably damaged'"' [citation], that is, if it is 'apprised of prejudice that it judges incurable by admonition or instruction' [citation]. 'Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.'

[Citation.] Accordingly, we review a trial court's ruling on a motion for mistrial for abuse of discretion. [Citation.]" (*People v. Avila* (2006) 38 Cal.4th 491, 573.)

Here, we cannot conclude that the trial court abused its discretion by refusing to grant a mistrial. At most, the jurors received blank verdict forms that required findings on the prior convictions, which they clearly did not understand. Further, the verdict forms did not impart prejudicial information of which the jury was previously unaware. The jury was advised by defendant himself that he had suffered five convictions and that he had been "incarcerated" in the past. The fact that the jurors were advised he was in "prison" and not just "incarcerated" is a distinction without a difference. Both reflect negatively on defendant's credibility.

Further, we do not believe the jury would have given import to the notations on the forms that the two prior convictions were serious or violent. The jurors were well aware of the nature of the prior convictions -- attempted arson and assault with a deadly weapon -- and the verdict forms did not provide any new, prejudicial information. The trial court did not abuse its discretion by denying the motion for mistrial.

"When . . . a jury innocently considers evidence it was inadvertently given, there is no misconduct. . . . There has been merely 'an error of law . . . such as . . . an incorrect evidentiary ruling.' [Citation.] Such error is reversible only if it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error." (*People v. Cooper* (1991) 53 Cal.3d 771, 836; see also *People v. Clair* (1992) 2 Cal.4th 629, 667-668; *People v. Jackson* (1996) 13 Cal.4th 1164, 1213-1214.)

As set forth, *ante*, the jurors were keenly aware that defendant had suffered prior convictions and had been incarcerated. The information was clearly not prejudicial in this case. Certainly, if defendant had not testified and the prior convictions were never discussed at trial, such information would in all likelihood be prejudicial. Based on the facts of this case, however, it was not.

Moreover, the jury received instructions as to the prior convictions. The jury was instructed, "If you find that a witness has been convicted of a felony, you may consider that fact in evaluating the credibility of the witness's testimony. The fact of a conviction does not necessarily destroy or impair a witness's credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable." (CALCRIM No. 316.) Further, the jury was instructed that "[t]he People presented evidence that the defendant committed other offenses that were not charged in this case. You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged offenses. Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. If the People have not met this burden, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offenses, you may, but are not required to, consider the evidence for the limited purpose of deciding whether or not the defendant acted with the intent to steal. In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offenses and the charged offenses. Do not consider this evidence for any other purpose except for the

limited purpose of intent . . . and determining defendant's credibility. [¶] Do not conclude from this evidence the defendant has a bad character or is disposed to commit crime. If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of any of the charges. The People must still prove each charged beyond a reasonable doubt." (CALCRIM No. 375.)

We must assume that the jurors followed the court's instruction (unless the record shows otherwise) and considered defendant's prior convictions for the sole purpose of determining defendant's credibility and his intent. (*People v. Osband* (1996) 13 Cal.4th 622, 714.) The record supports that the jurors did not convict defendant solely based on his prior crimes. The verdict forms apparently confused the jurors, as they were in conflict with the given instructions.

Moreover, despite being given access to the jurors' names and telephone numbers, defendant never filed a motion for new trial. Defendant could have investigated what occurred in the jury deliberation room and provided additional evidence to the trial court. By failing to do so, we can only rely on the record before us, which does not show prejudice.

Finally, as set forth in detail, *ante*, the evidence against defendant was overwhelming. We conclude the trial court did not abuse its discretion by denying defendant's motion for mistrial, and he was not prejudiced by the jury inadvertently receiving improper verdict forms.

IV

ROMERO MOTION

Defendant contends that the trial court abused its discretion by declining to strike his prior serious and/or felony convictions pursuant to *Romero*.[6]

A. *Additional Factual Background*

Prior to trial, defendant brought a motion to strike one of the prior serious or violent felony convictions. The trial court denied the motion. A court trial on the prior convictions was conducted. Defendant's fingerprints rolled during the trial matched those in the section 969b packet. The trial court found all of the prior convictions true.

At the time of sentencing, the trial court revisited the *Romero* motion. The trial court indicated that it had reviewed the *Romero* motion filed by defendant and was not inclined to strike any of the prior convictions. Defendant clarified he was only asking that the attempted arson prior conviction be struck. Defendant's counsel explained that the prior attempted arson occurred while defendant was in state prison. He and his cellmate attempted to light their mattress on fire during a disturbance. Defendant's counsel argued that, based on the nature of the prior offense, it should be stricken. Defendant did not fall within the spirit of the three strikes law. Defendant requested that he be given less than a life sentence and that drug treatment be ordered.

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[6] In the trial court, defendant made it clear that he was only asking the trial court to strike one of his prior convictions. Hence, we only consider on appeal whether the trial court abused its discretion by refusing to strike one of the prior convictions.

The People argued this was not the rare case where striking the priors was appropriate. The trial court chose not to strike either of the prior convictions, finding, " . . . I have someone before me who does not clearly fall outside the spirit and intent of the Three Strikes Law and who at this point, if the drug problem is not solved, is very likely to re offend [*sic*] again, even if I were to strike a strike."

Defendant then requested that the trial court stay the prior prison term enhancements. The People advised the trial court that it did not have the power to stay the prison priors; it must impose or strike them. The trial court indicated that it was going to strike two of the prior prison term enhancements. Defendant was sentenced to 27 years to life.

B. *Analysis*

A trial court's decision to not dismiss or strike a prior serious and/or violent felony conviction allegation under section 1385 is reviewed for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376 (*Carmony I*).) "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, '"[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review."' [Citation.] Second, a '"decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'"' [Citation.] Taken together, these

precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at pp. 376-377; see also *People v. Myers* (1999) 69 Cal.App.4th 305, 309.)

But "[i]t is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance. [Citation.]" (*People v. Myers*, *supra*, 69 Cal.App.4th at p. 310.) "Because the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*Carmony I*, *supra*, 33 Cal.4th at p. 378.)

The California Supreme Court explained, "In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not 'aware of its discretion' to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation]." (*Carmony I, supra*, 33 Cal.4th at p. 378.) Discretion is also abused when the trial court's decision to strike or not to

strike a prior is not in conformity with the "spirit" of the law. (*People v. Williams* (1998) 17 Cal.4th 148, 161; *People v. Myers, supra,* 69 Cal.App.4th at p. 310.)

Defendant has not met his burden of showing that the trial court's decision not to strike his prior conviction was irrational or arbitrary. The trial court's determination that a three-strikes sentence was warranted based on defendant's inability to address his drug problem and continuing to commit crimes was well within its discretion.

We disagree with defendant's characterization of his current offense as "extremely minor . . . ." Here, defendant broke a plate glass window and entered a video store in broad daylight. He then stole $13,000 worth of merchandise. It was merely fortuitous that Lopez did not come to work earlier and create a potential of harm to her. Although defendant argues that the trial court did not take into account defendant's current offense in refusing to strike one of his prior convictions, the trial court sat through the trial and was well aware of the circumstances when exercising its sentencing discretion.

Further, defendant essentially was in prison from 1997 until 2006. He had two prior convictions for burglary occurring in 1996 and 1997, for which he served time in prison. In 1996 he suffered a misdemeanor conviction for petty theft and another misdemeanor conviction for willful infliction of corporal injury on a spouse or cohabitant in 1998. In 1999, he was convicted of petty theft with a prior conviction. In 2000, he suffered one of the strikes, for assault with a deadly weapon. He then committed the

second strike in 2002, the attempted arson. Defendant also had a pending case for possession of methamphetamine while in jail on the instant case.[7]

Defendant relies heavily on the fact that he committed his prior offenses and current offense due to a drug problem. This argument ignores that he could have resolved his drug problem long before the current offense but apparently had never even tried. (See *People v. Reyes* (1987) 195 Cal.App.3d 957, 963 ["where the defendant has failed to deal with the problem despite repeated opportunities, where the defendant shows little or no motivation to change his life style, and where the substance abuse problem is a substantial factor in the commission of crimes, the need to protect the public from further crimes by that individual suggests that a longer sentence should be imposed, not a shorter sentence"].)

Given defendant's continuous criminal history and the fact that he was involved in the current offense, which presented a potential for violence had employees been present or had they arrived during the burglary, we conclude that the trial court did not abuse its discretion by refusing to strike one, or even both, of the prior convictions. Defendant was well within the spirit of the three strikes law.

V

CRUEL AND/OR UNUSUAL PUNISHMENT

Defendant also contends that his sentence of 27 years to life constitutes cruel and/or unusual punishment under the state and federal Constitutions.[8]

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[7] After sentencing in this case, defendant pleaded guilty in that case to a violation of Health and Safety Code section 11377, subdivision (a).

"A sentence may violate the state constitutional ban on cruel and unusual punishment (Cal. Const., art. I, § 17) if '". . . it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity."' [Citation.]" (*People v. Thongvilay* (1998) 62 Cal.App.4th 71, 87-88.) "In examining whether a sentence is cruel and unusual under California law, this court: (1) examines the 'nature of the offense and/or the offender, with particular regard to the degree of danger both present to society' [citation]; (2) compares the challenged punishment with punishments prescribed for more serious offenses in the same jurisdiction; and (3) compares the challenged punishment with punishments prescribed for the same offense in other jurisdictions [citation]." (*People v. Cline* (1998) 60 Cal.App.4th 1327, 1337 (*Cline*).)

It is permissible to base the determination of whether punishment is cruel and unusual solely on the offense and the offender. (*People v. Ayon* (1996) 46 Cal.App.4th 385, 399, disapproved on other grounds in *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10; see, e.g., *People v. Young* (1992) 11 Cal.App.4th 1299, 1308-1311; *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1198-1200 .)

Defendant provides no real argument as to why, based on the nature of his offense and him as an offender, he should not have received a 27-years-to-life sentence. He committed a highly risky offense of commercial burglary when he broke a window and

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[footnote continued from previous page]

8 Although defendant did not object to the sentence on this ground in the lower court, the People do not argue that this claim is waived. (See *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.) Hence, we do not address that issue.

entered the video store. He committed his crime in broad daylight, showing he was determined to steal in order to support his drug habit. An employee arrived soon after defendant was apprehended by police and could just as easily have entered the store while he was committing the burglary.

Moreover, defendant's sentence was calculated on the basis of his recidivist behavior. (*Cline, supra,* 60 Cal.App.4th at p. 1338.) As set forth in detail, *ante,* defendant had numerous previous convictions as well as a pending case for possession of methamphetamine.

Defendant has been unable to stay free from imprisonment or breaking the law. A sentence of 27 years to life based on his recidivism and a current offense that carried a potential for violence was not unconstitutional as it was proportional to defendant's personal culpability (see *People v. Stone* (1999) 75 Cal.App.4th 707, 715) and does not "'shock the conscience'" (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1517).

Where the punishment is proportionate to the defendant's personal culpability, there is no requirement that it be proportionate to other similar cases. (*People v. Webb* (1993) 6 Cal.4th 494, 536.) Because intercase proportionality is not required to avoid the infliction of cruel or unusual punishment (*People v. Crittenden* (1994) 9 Cal.4th 83, 156), we address the second and third prongs as set forth in *Cline, supra,* 60 Cal.App.4th at p. 1337, only briefly.

With respect to sentences for other offenses in the same jurisdiction, defendant complains that he must serve a longer term than a person convicted of second degree murder, which is punishable by a 15-years-to-life sentence, and other crimes, including

voluntary manslaughter, kidnapping, and robbery. He also contends that his sentence is the same had he been convicted of first degree murder with no special circumstances. This argument has been repeatedly rejected: "[P]roportionality assumes a basis for comparison. When the fundamental nature of the offense and the offender differ, comparison for proportionality is not possible. The seriousness of the threat a particular offense poses to society is not solely dependent on whether it involves physical injury. Consequently, the commission of a single act of murder, while heinous and severely punished, cannot be compared with the commission of multiple felonies. [Citation.]" (*People v. Cooper* (1996) 43 Cal.App.4th 815, 826; accord, *People v. Gray* (1998) 66 Cal.App.4th 973, 993; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1137.) One cannot compare a recidivist offense to a nonrecidivist offense. (*Cline, supra*, 60 Cal.App.4th at p. 1338.)

Defendant tries to avoid the above authorities by arguing his sentence is almost as long as a second-strike offender who commits second degree murder. However, an offender who has committed only one prior felony again is not comparable to a person who has committed multiple felonies.

Finally, with respect to sentences for the same offense in other jurisdictions, "California's scheme is part of a nationwide pattern of statutes calling for severe punishments for recidivist offenders. [Citation.]" (*Cline, supra*, 60 Cal.App.4th at p. 1338.) The fact "[t]hat California's punishment scheme is among the most extreme does not compel the conclusion that it is unconstitutionally cruel or unusual. This state constitutional consideration does not require California to march in lockstep with other

states in fashioning a penal code. It does not require 'conforming our Penal Code to the "majority rule" or the least common denominator of penalties nationwide.' [Citation.] Otherwise, California could never take the toughest stance against repeat offenders or any other type of criminal conduct." (*People v. Martinez, supra*, 71 Cal.App.4th at p. 1516.) We cannot conclude defendant's sentence constituted cruel or unusual punishment under the California Constitution.

Defendant further claims his sentence violates the prohibition against cruel and unusual punishment under the federal Constitution. We disagree. The hurdles defendant must surmount to demonstrate cruel and unusual punishment under the federal Constitution are, if anything, higher than under the state Constitution. (See generally *People v. Cooper, supra*, 43 Cal.App.4th at pp. 819-825.) In *Rummel v. Estelle* (1980) 445 U.S. 263 [100 S.Ct. 1133, 63 L.Ed.2d 382], the Supreme Court upheld a sentence under a Texas recidivist statute of life with the possibility of parole for obtaining $120.75 by false pretenses. The defendant's previous offenses consisted of fraudulent use of a credit card to obtain goods and services worth $80 and passing a forged check in the amount of $28.36. (*Id*. at pp. 268-286.) Here, defendant's prior offenses were much more serious and frequently committed than the defendant in *Rummel*. In addition, his current offense presented a potential for violence. Accordingly, his sentence passes muster under the federal Constitution

We cannot conclude based on defendant's extensive record and the current offense that his sentence constitutes cruel and/or unusual punishment under either the federal or the state Constitution.

VI

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the minute order from the date of sentencing, May 8, 2009, to reflect that the trial court struck two of defendant's prior convictions suffered under section 667.5, subdivision (b), rather than staying them; to correct the abstract of judgment to reflect the proper sentence; and to send a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P.J.

HOLLENHORST
J.